Supreme Court, U.S.
FILED
AUG 15 2005
OFFICE OF THE CLERK

(3)

No. 04-1544

In The Supreme Court of the United States

VICKIE LYNN MARSHALL,

Petitioner,

v.

E. PIERCE MARSHALL,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

REPLY BRIEF FOR THE PETITIONER

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REPLY BRIEF FOR THE PETITIONER

> "'It is of first importance to have a definition so clear cut that it will not invite extensive threshold litigation over jurisdiction.' . . . *Jurisdiction should be as self-regulated as breathing.*"[1]

Determining the threshold issue of the probate exception is not "as self-regulated as breathing." Anything but – both commentators and courts have repeatedly lamented the irreconcilable lack of uniformity in the probate exception jurisprudence. Pet. 1-2; *see also* David P. Currie, *The Federal Courts and the American Law Institute, Part II*, 36 U. Chi. L. Rev. 268, 319 (1969) (by 1965, probate exception cases were already so confused that the American Law Institute voted unanimously to abandon a restatement because "the Institute's members were unable to agree on the definition of the excluded subjects – not surprisingly, in view of the amorphous state of the law").

The lack of uniformity is evident from even a brief survey of probate exception opinions. Pet. 12-20. It is also evidenced by another pending certiorari petition, *Snavely v. Miller*, No. 05-8, that raises the same issues presented here: the scope of the probate exception as applied to federal bankruptcy jurisdiction. It is a testament to the confusion over the probate exception that this Court should simultaneously entertain two petitions from the same circuit that arise from nearly identical cases but reach opposite conclusions.

The Brief In Opposition by respondent E. Pierce Marshall ("Pierce") does not seriously attempt to demonstrate

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[1] David P. Currie, *The Federal Courts and the American Law Institute, Part I*, 36 U. Chi. L. Rev. 1, 1 (1968-69).

that this profound split does not exist. Instead, Pierce simply asserts that a version of the probate exception applied by several circuits is the law of the land, and he demonstrates that the opinion below does not conflict with decisions of *those circuits*. In so doing, Pierce asserts that courts uniformly determine the scope of the probate exception with reference to state law, and thus that federal jurisdiction expands or contracts depending on the peculiarities of a state's probate system. This is patently wrong: This Court repeatedly has rejected the notion that federal jurisdiction over probate-related matters depends on state law, and many circuits define the probate exception in terms utterly independent of state law. Pierce simply ignores those authorities which, if applied here, unquestionably would have compelled a different result. Nor does he grapple seriously with the significant split of authority over whether the probate exception applies at all in federal question or bankruptcy cases.

Because he cannot demonstrate uniform application of the probate exception, Pierce instead devotes nearly half his brief to manipulating the record to cast petitioner Vickie Lynn Marshall ("Vickie") in a bad light. Most of his factual distortions, *see* App. 39-146, are irrelevant to the issues before the Court, and we do not address them. One point bears mention, however. Pierce repeatedly insinuates that Vickie forum-shopped because she asserted the same claim in two courts. That manifestly was not her purpose. Vickie's tort claim against Pierce in the bankruptcy court was a mandatory counterclaim to his adversary action against her. App. 42-43. She filed the same claim in Texas years later only after Pierce objected to the federal court's jurisdiction and the limitations period had nearly run. *Marshall v. Marshall (In re Marshall)*, 273 B.R. 822, 825-26 (Bankr. C.D.

Cal. 2002); ER 959, 1056. That it was necessary for Vickie to assert the same claim in two forums only underscores the confused state of the law and need for clarification. This case presents the issue in pristine form and is an ideal vehicle for certiorari review.

I. THE NINTH CIRCUIT'S ANALYSIS CONFLICTS WITH THIS COURT'S PROBATE EXCEPTION JURISPRUDENCE.

A central thesis of Pierce's opposition is that this Court's prior decisions uniformly hold there is no federal jurisdiction over any matter that, *under state law*, is in the exclusive jurisdiction of a state probate court. Opp. 14, 18-20. Not so. While two opinions of the Court arguably suggest that federal jurisdiction over probate-related matters depends to some degree on state law, *Sutton v. English*, 246 U.S. 199 (1918); *Farrell v. O'Brien*, 199 U.S. 89 (1905),[2] the weight of the Court's authority holds that state probate law cannot impair federal jurisdiction. *See, e.g., Waterman v. Canal-Louisiana Bank & Trust Co.*, 215 U.S. 33, 43 (1909) ("[federal] jurisdiction may be exercised, and is not subject to limitations or restraint by state legislation establishing courts of probate and giving them jurisdiction over similar matters"); *Hayes v. Pratt*, 147 U.S. 557, 570 (1893) (state probate statutes cannot "defeat or impair the general equity jurisdiction of the Circuit Court of the United States to

[2] Even *Sutton* and *Farrell* do not utilize state law in the way Pierce suggests. They hold that states can *expand* federal jurisdiction by permitting *inter partes* actions "to annul a will or to set aside the probate," but they do not suggest that states can *contract* federal jurisdiction by expanding the traditional scope of probate proceedings. *Sutton*, 246 U.S. at 205; *Farrell*, 199 U.S. at 110-12; *see Golden v. Golden*, 382 F.3d 348, 358-60 (3d Cir. 2004).

administer . . . the assets of a deceased person within its jurisdiction"); *Green's Adm'x v. Creighton*, 64 U.S. 90, 107-08 (1860) ("a foreign creditor may establish his debt in the courts of the United States against the representatives of a decedent, notwithstanding the local laws relative to the administration and settlement of insolvent estates"). Although the Petition cites these cases, Pierce does not address them or the principle they articulate.

This Court's opinions also undermine Pierce's claim that the probate exception "exists precisely to" avoid concurrent federal-state jurisdiction over probate-related matters. Opp. 2. The probate exception emanates from the Judiciary Act of 1789 – it is not a doctrine of comity. Pet. 9-10. Moreover, this Court's cases consistently hold that the probate exception does *not* preclude concurrent federal-state jurisdiction over claims to a decedent's assets; instead, the probate exception is invoked only where a federal court probates a will or "'*disturb[s] the possession of . . . property* by the state court.'" *Waterman*, 215 U.S. at 44 (citations omitted, emphasis added); *and see* Pet. 7-12. This Court's cases also clearly hold there is federal jurisdiction to adjudicate "a debt against the estate," *Waterman*, 215 U.S. at 44, or "the validity or construction of a will," *Gaines v. Fuentes*, 92 U.S. 10, 22 (1876); *see also Payne v. Hook*, 74 U.S. 425 (1868) (probate exception did not bar plaintiff's suit to obtain her intestate share of her brother's estate); *McClellan v. Carland*, 217 U.S. 268, 275-76 (1910) (probate exception did not bar plaintiffs' claim to be "the sole heirs at law and next of kin of said decedent, and entitled to inherit the estate, real and personal").[3]

[3] These cases fatally undermine Pierce's claim that there is no federal jurisdiction here because "Vickie's claim is not *inter partes*." Opp. 23. Pierce contends claims are *in rem*, and thus are barred by the

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Markham v. Allen, 326 U.S. 490 (1946) comports with this analysis – not with Pierce's thesis that state law determines the probate exception's scope. *Markham* holds that federal courts cannot "interfere with the probate proceedings," *id.* at 494, but it in no way suggests that "interference" depends on state law. Rather, under *Markham*, federal courts "interfer[e] with . . . probate" only if they "disturb or affect the *possession of property* in the custody of a state court." *Id.* at 494 (emphasis added). There is *no* such improper interference, *Markham* holds, where a federal court merely "adjudicate[s] rights in" a decedent's property, even if that adjudication will bind a probate court. *Id.*

II. THE COURTS ARE IRRECONCILABLY IN CONFLICT OVER THE REACH OF THE PROBATE EXCEPTION.

Pierce is simply wrong that the Ninth Circuit's reliance on state law is consistent with the jurisprudence of every other circuit. While some circuits hold that the probate exception depends on state law,[4] three circuits (the Fifth and Eleventh, plus many panels of the Second) – circuits that Pierce almost entirely ignores, *see* Opp. 27-29 – manifestly do not. Pet. 12-18.[5] In these circuits, the probate

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probate exception, if they have any effect on the distribution of estate assets. Not so: This Court repeatedly has held there is federal jurisdiction over probate-related claims unless a federal court purports to make orders directly against an estate *res*. Pet. 7-12.

[4] Even circuits that consider state law in determining the scope of the probate exception are split on how to do so. *See* Pet. 14-18.

[5] The Seventh Circuit applies an entirely different test, but one that also is independent of state law. There, the probate exception bars suits that if "'maintained in federal court would impair the policies

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exception applies, *without regard to state law*, only if a federal court probates a will or directly distributes estate assets. Pet. 12-14. It expressly does *not* apply if a court merely issues "a decree between the parties," *Robertson v. Robertson*, 803 F.2d 136, 139 (5th Cir. 1986), even if the decree adjudicates a party's "'right to share in the estate,'" *Dulce v. Dulce*, 233 F.3d 143, 148 (2d Cir. 2000); *see also Michigan Tech Fund v. Century Nat'l Bank*, 680 F.2d 736, 739-41 (11th Cir. 1982) (probate exception does not foreclose federal court from interpreting a will or adjudicating a claim for breach of agreement to make a will); *Ashton v. Josephine Bay Paul and C. Michael Paul Foundation, Inc.*, 918 F.2d 1065, 1072 (2d Cir. 1990) ("Merely determining the rights to, as opposed to administering, assets is not proscribed by the probate exception."); *Turton v. Turton*, 644 F.2d 344, 347 (5th Cir. 1981) (federal court may "declar[e] the validity of the asserted claims, leaving the claimants to assert their federal judgments as *res judicata* in the probate court.").[6]

Thus, Pierce is plainly wrong "that the result in this case would [not] be different" in other circuits, or that any variation in result is fully explained by the vagaries of state law. Opp. 29. Had Vickie's suit arisen in the Second, Fifth or Eleventh Circuit, it would not have been barred by

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served by the [probate exception].'" Pet. 16-17, quoting *Storm v. Storm*, 328 F.3d 941, 943-44 (7th Cir. 2003).

[6] Because Texas probate law is irrelevant to whether certiorari should be granted, we do not discuss it except to note that the Opposition fundamentally mischaracterizes the scope of exclusive Texas probate court jurisdiction. As the district court held, under Texas law the probate court lacked exclusive jurisdiction over Vickie's claim. App. 165-70. The Texas probate court agreed: When Pierce asked the Texas court to enjoin Vickie from proceeding in the bankruptcy court, the court declined to do so, stating, "I think [the bankruptcy judge] can order a judgment for money damages [against Pierce]." SER 12291.

the probate exception because it was against Pierce individually, not Howard's probate estate or testamentary trust. App. 152, 162-63. And, even if her claim were not against Pierce personally, at most it sought a judgment adjudicating her "'right to share in the estate,'" *Dulce*, 233 F.3d at 148[7] – a judgment the Second, Fifth and Eleventh Circuits repeatedly have held would not invoke the probate exception. Pet. 12-14; *see also DeWitt v. Duce*, 599 F.2d 676, 677 (5th Cir. 1979) (tortious interference claim not barred by the probate exception); *Glickstein v. Sun Bank/Miami*, 922 F.2d 666, 668 n.2, 672-74 (11th Cir. 1991) (same); *and see Michigan Tech*, 680 F.2d at 739-41 (breach of agreement to make a will not barred by the probate exception).[8]

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[7] Pierce's repeated suggestion that the district court "invalid[ated]" Howard's will and trust, Opp. 1, 2, is patently false. While the district court made findings about Howard's intended distribution of his assets – specifically, whether Howard intended to gift some of his vast wealth to Vickie during his life – those findings were relevant only to the damages award entered for Vickie and against Pierce. The district court did *not* strike down Howard's testamentary documents themselves, nor did Vickie ask it to. App. 162-63. Pierce's misstatement is superficially appealing only because both the probate and federal courts necessarily considered to some degree what Howard intended to do with his assets. But while that overlap may raise *res judicata* concerns, those concerns are not jurisdictional.

[8] This result is consistent with this Court's analysis of the "domestic relations exception," which Pierce suggests is analogous to the probate exception. Opp. 24-25. In *Ankenbrandt v. Richards*, 504 U.S. 689 (1992), the Court held that the domestic relations exception bars federal jurisdiction over "the issuance of a divorce, alimony, or child custody decree," but it does *not* preclude jurisdiction over a tort action between divorced parents. *Id.* at 669, 703-04. That was so, the Court held, even though the federal claims of physical and sexual abuse overlapped in significant ways with a state suit seeking termination of the father's parental rights. *Id.* at 691 n.1, 704.

III. THE COURTS ARE IN CONFLICT OVER WHETHER THE PROBATE EXCEPTION APPLIES TO FEDERAL QUESTION CASES.

Contrary to Pierce's suggestion, this Court has never held that the probate exception applies to federal question cases generally, or bankruptcy cases specifically. *Harris v. Zion Sav. Bank & Trust Co.*, 317 U.S. 447 (1943) – which Pierce says "applied the Probate Exception to overturn a bankruptcy court's assertion of bankruptcy jurisdiction under an express statutory grant," Opp. 21 – is not a probate exception case at all. Rather, the Court reached only a narrow question of statutory interpretation. Pet. 19 n.6.

Pierce is also wrong that the Ninth Circuit's application of the probate exception to bankruptcy is consistent with other circuits. The Eleventh Circuit expressly held that the probate exception is limited to diversity cases in *Glickstein v. Sun Bank/Miami*, 922 F.2d 666 (11th Cir. 1991) – a case that, although discussed in the Petition, Pierce does not address. Pierce does try to explain away the holding in *Goerg v. Parungao (In re Goerg)*, 844 F.2d 1562 (11th Cir. 1988) as "pure dicta." Opp. 26. It is not: *Goerg* held that a federal court properly exercised jurisdiction over the property of an insolvent foreign decedent – a conclusion it could not have reached if the probate exception ousted federal jurisdiction. Pet. 20 n.7; *see also* Pet. 20 n.8 (noting district court split over whether the probate exception applies outside diversity cases).

It is critical that this Court resolve the circuit conflict over whether the probate exception applies to federal question cases generally, and bankruptcy cases specifically. Until the Ninth Circuit's opinion here, 150 years of probate exception cases yielded no decision holding that the probate exception might oust plenary federal jurisdiction over

bankruptcy. In the seven months since the Ninth Circuit's opinion, however, another court applied the probate exception in bankruptcy, *Litzinger v. Estate of Litzinger* (*In re Litzinger*), 322 B.R. 108 (B.A.P. 8th Cir. 2005), and another declined to do so, resulting in a now-pending certiorari petition, *Snavely v. Miller*, No. 05-8. If the decision below stands, the Court will inevitably see many more cases where bankruptcy jurisdiction is declined pursuant to the probate exception.

IV. VICKIE'S CLAIM IS NOT BARRED BY *RES JUDICATA* OR COLLATERAL ESTOPPEL.

Pierce argues that this case is an inappropriate vehicle for certiorari review because "Vickie's Claim is also barred by the doctrines of *res judicata* and collateral estoppel." Opp. 29. That a judgment may be subject to reversal on grounds *independent* of those raised in a certiorari petition is no basis for denying certiorari. *See, e.g.*, *Exxon Mobil Corp. v. Saudi Basic Indust. Corp.*, 125 S. Ct. 1517, 1527 (2005) (reaching jurisdictional question posed in *Rooker-Feldman* case, even though the "[d]isposition of the federal action, once the state-court adjudication is complete, would be governed by preclusion law").

In any event, Vickie's federal claim is not barred by the Texas judgment. When two actions are pending concurrently, preclusion attaches to the first final judgment. 18 Charles Alan Wright et al., *Federal Practice and Procedure*, § 4404 (2d ed. 2002). Here, the bankruptcy court entered judgment nearly a year before the Texas probate judgment. App. 17, 19. Moreover, Vickie did not actually litigate her tortious interference claim to judgment in

Texas; once she obtained judgment in the bankruptcy court, she immediately dismissed her claims in Texas. *Marshall*, 273 B.R. at 826. Finally, Vickie's tortious interference claim was not actually tried in Texas: Consistent with Pierce's repeated representations to the bankruptcy court that the tortious interference claim was *not* at issue in the probate proceedings, the only question the Texas jury considered concerning Vickie was whether Howard breached an *agreement* to leave her half his property – a finding irrelevant to Vickie's tortious interference claim. *Id.* at 826, 831-32. Thus, the district court properly held that the Texas judgment did not preclude Vickie's federal claims, *Marshall v. Marshall (In re Marshall)*, 271 B.R. 858, 862-67 (C.D. Cal. 2001); ER 5389, a conclusion the Ninth Circuit never reviewed.

CONCLUSION

For the foregoing reasons, petitioner respectfully requests that this Court grant the petition for writ of certiorari.

Respectfully submitted,

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